Triple Zest Trading & Suppliers Sdn Bhd & Ors v Applied Business Technologies Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-02(NCvC)(W)-765–07 OF 2020 AND A-02(NCvC)(W)-855–07 OF 2020
LEE SWEE SENG, AZIZAH NAWAWI AND SUPANG LIAN JJCA
26 JANUARY 2023

Moneylenders — Friendly loan — Whether evidence showed it was actually illegal moneylending transaction — Loan agreement carried clause that loan sum had to be repaid together with equivalent sum as 'agreed profit' — Whether judgment could only be given for repayment of the principal loan sum without the 'agreed profit' — Whether land titles that lender had taken as collateral had to be returned to their rightful owners — Whether borrower had not been able to positively prove lender was illegal moneylender or was carrying on the business of moneylending — Whether lender had rebutted on balance of probabilities presumption under s 10OA of Moneylenders Act 1951 that it was carrying on the business of moneylending

The first appellant ('A1') was a family-owned company. The second appellant ('Junaidah') and third appellant ('Fairuz') were its directors. Junaidah was also the mother of Fairuz and one Mumtaz Syafinaz ('Mumtaz'). The respondent was involved in, amongst other things, the business of information technology. A1 required funds for its business and approached the respondent which agreed to grant A1 a 'friendly loan' of RM800,000 subject to the amount being repaid together with another RM800,000 as 'agreed profit'. Upon signing of the loan agreement, A1 deposited with the respondent as collateral the title deeds to two parcels of land, four undated cheques in favour of the respondent each for the sum of RM400,000 from A1's current account and personal guarantees signed by Junaidah and Fairuz guaranteeing repayment of the loan. Junaidah and Mumtaz were the co-owners of the two parcels of land. When A1 defaulted in repayment of the loan, the respondent sued A1, Junaidah, Fairuz and Mumtaz for an order that the lands be transferred to the respondent; alternatively, if the appellants were ordered to pay the respondent the sum of RM1.6m (the loan amount plus the 'agreed profit'), then the lands be auctioned off to satisfy the said sum. In their defence to the suit, the defendants said they never consented to the 'agreed profit' sum, that the entire transaction was an illegal moneylending transaction, that the respondent exercised undue influence on Junaidah and Fairuz into signing the personal guarantees and that Mumtaz had nothing at all to do with the loan agreement and had never pledged the lands to the respondent as security for the loan. Following a full trial, the High Court

ordered the appellants to pay the respondent the sum of RM1.6m with interest at 4%pa from date of judgment until date of full settlement. Among other things, the court found that the loan was not an illegal moneylending transaction as there was no evidence to show that the respondent had carried on the business of moneylending. The court also found that: (a) the appellants had agreed to repay the principal loan sum together with the 'agreed profit' sum; (b) the respondent had no cause of action against Mumtaz, who had nothing to do with the loan agreement, and therefore the lands that she co-owned could not be transferred to the respondent; and (c) the respondent had not exercised any undue influence over A1's directors into executing the loan agreement or the guarantees. Both parties filed the instant appeals against the High Court's decision — the appellants against the whole of the decision; the respondent against that part of the decision disallowing the transfer of the lands to the respondent or ordering the lands to be auctioned off to satisfy its debt. At the appeal hearing, the appellants argued that the respondent never rebutted the presumption under s 10OA of the Moneylenders Act 1951 ('the MA') that it was a moneylender. They said the trial judge also erred in holding that the loan agreement and guarantees were valid when the entire transaction contravened various provisions of the MA.

Held, unanimously setting aside the High Court's decision, entering judgment against the appellants in favour of the respondent for the sum of RM800,000 together with interest thereon at 4%pa from date of the High Court's decision until date of realisation, dismissing the respondent's appeal and ordering the respondent to return the title deeds to the lands to Junaidah and Mumtaz within 14 days:

(1) Even if the rebuttable presumption that the respondent was carrying on the business of moneylending had arisen under s 10OA of the Moneylenders Act 1951 ('the MA'), this court found as a fact that the respondent had adduced sufficient evidence to rebut that presumption on a balance of probabilities. The evidence of SP1 that the respondent was in the business of information technology was not disputed by the appellants. There was no evidence or sufficient proof before the trial court that the respondent was engaged in the business of moneylending, nor any evidence that the respondent had loaned money to borrowers in the past. In the absence of such evidence, the respondent had successfully rebutted the presumption under s 10OA of the MA and the appellants had failed to prove on balance of probabilities that the respondent was an illegal moneylender. The court found that this was a case of a friendly loan between the respondent and A1. Therefore, ss 5(1) and 15 of the MA had no application and did not invalidate the friendly loan agreement between the parties (see paras 47–48).

(2) In the case of a friendly loan, like in the present case, no interest ought to be chargeable and indeed the respondent as lender had already taken

custody of the two land titles and had the personal guarantees of the second and third appellants in its favour. Thus, in respect of the appellants' appeal, the High Court's order was substituted with an order that judgment be entered against the appellants only for the principal sum of RM800,000 together with interest thereon at 4%pa from date of the High Court judgment until realisation (see para 49).

(3) The respondent's appeal was dismissed and the respondent was ordered to return the land titles to their registered owners, namely, Junaidah and Mumtaz, within 14 days. No order for the removal of caveats on the lands was made because it was a matter that was not pleaded or claimed for (see para 50).

[Bahasa Malaysia summary

Perayu pertama ('A1') adalah sebuah syarikat yang dimiliki keluarga. Perayu kedua ('Junaidah') dan perayu ketiga ('Fairuz') merupakan pengarahnya. Junaidah juga merupakan ibu kepada Fairuz dan Mumtaz Syafinaz ('Mumtaz'). Responden terlibat dengan, antara lain, perniagaan teknologi maklumat. A1 memerlukan dana untuk perniagaannya dan responden bersetuju memberikan 'pinjaman mesra' sebanyak RM800,000 kepada A1 tertakluk kepada jumlah yang dibayar bersama RM800,000 lagi sebagai 'keuntungan yang dipersetujui'. Setelah menandatangani perjanjian pinjaman itu, A1 mendepositkan surat cagaran ikatan hak milik kepada responden, dua bidang tanah, empat cek tidak bertarikh yang memihak kepada responden masing-masing berjumlah RM400,000 dari akaun semasa A1 dan jaminan peribadi yang ditandatangani Junaidah dan Fairuz untuk menjamin pembayaran balik pinjaman itu. Junaidah dan Mumtaz merupakan pemilik bersama dua bidang tanah berkenaan. Apabila A1 gagal membayar balik pinjaman itu, responden menyaman A1, Junaidah, Fairuz dan Mumtaz bagi mendapatkan perintah bahawa tanah-tanah itu dipindahkan kepada responden; sebagai alternatif, jika perayu-perayu ('perayu') diperintahkan membayar kepada responden sejumlah RM1.6 juta (jumlah pinjaman ditambah dengan 'keuntungan yang dipersetujui'), maka tanah-tanah itu akan dilelong untuk membayar wang tersebut. Dalam pembelaan mereka terhadap saman itu, defendan berkata mereka tidak pernah bersetuju dengan jumlah 'keuntungan yang dipersetujui' dan menyatakan bahawa keseluruhan transaksi itu adalah transaksi pinjaman wang haram. Responden juga dikatakan menggunakan pengaruh yang tidak wajar terhadap Junaidah dan Fairuz untuk menandatangani jaminan peribadi dan Mumtaz tiada kaitan dengan perjanjian pinjaman itu dan tidak pernah menjanjikan tanah tersebut kepada responden sebagai jaminan untuk pinjaman itu. Setelah perbicaraan penuh, Mahkamah Tinggi memerintahkan perayu membayar kepada responden sejumlah RM1.6 juta dengan faedah pada kadar 4% setahun dari tarikh penghakiman sehingga tarikh penyelesaian penuh. Antara lain, mahkamah mendapati pinjaman itu bukan transaksi pinjaman wang haram kerana tiada bukti yang menunjukkan

bahawa responden menjalankan perniagaan pinjaman wang. Mahkamah juga mendapati bahawa: (a) perayu telah bersetuju untuk membayar balik jumlah pinjaman pokok dengan jumlah 'keuntungan yang dipersetujui'; (b) responden tidak mempunyai kausa tindakan terhadap Mumtaz, yang tiada pertalian dengan perjanjian pinjaman itu, dan oleh itu tanah yang dimilikinya tidak boleh dipindahkan kepada responden; dan (c) responden tidak mempunyai pengaruh yang tidak wajar ke atas pengarah A1 untuk melaksanakan perjanjian pinjaman atau jaminan tersebut. Kedua-dua pihak memfailkan rayuan segera terhadap keputusan Mahkamah Tinggi — perayu terhadap keseluruhan keputusan itu; responden membantah sebahagian dari keputusan itu yang tidak membenarkan pemindahan tanah itu kepada responden atau mengarahkan tanah-tanah itu dilelong untuk membayar hutangnya. Di dalam pendengaran rayuan itu, perayu berhujah bahawa responden tidak pernah membantah penggunaan anggapan di bawah s 10OA Akta Pemberi Pinjam Wang 1951 ('APPW') bahawa ianya adalah pemberi pinjam wang. Mereka menghujahkan bahawa hakim perbicaraan juga terkhilaf dalam memutuskan bahawa perjanjian pinjaman dan jaminan adalah sah apabila keseluruhan transaksi melanggar peruntukan-peruntukan APPW.

Diputuskan, sebulat suara mengenepikan keputusan Mahkamah Tinggi, memasukkan penghakiman terhadap perayu-perayu yang berpihak kepada responden untuk jumlah sebanyak RM800,00 berserta faedah sebanyak 4% setiap tahun dari tarikh keputusan Mahkamah Tinggi hinga tarikh penyelesaian, menolak rayuan responden dan memerintahkan responden mengembalikan surat ikatan hak milik tanah-tanah tersebut kepada Junaidah dan Mumtaz dalam tempoh 14 hari:

(1) Walaupun anggapan yang boleh dicabar bahawa responden menjalankan perniagaan pinjaman wang dibangkitkan di bawah s 10OA Akta Pemberi Pinjam Wang 1951 ('APPW'), mahkamah ini mendapati bahawa menurut fakta responden telah mempunyai keterangan yang mencukupi untuk mencabar anggapan melebihi imbangan kebarangkalian. Keterangan SP1 bahawa responden terlibat dengan perniagaan teknologi maklumat tidak dipertikaikan oleh perayu. Tiada keterangan ketika di mahkamah perbicaraan bahawa responden terlibat dalam perniagaan pinjaman wang, atau sebarang keterangan bahawa responden telah meminjamkan wang kepada peminjam sebelum itu. Dengan ketiadaan keterangan tersebut, responden telah berjaya mencabar anggapan di bawah s 10OA APPW dan perayu telah gagal membuktikan di atas imbangan kebarangkalian bahawa responden adalah pemberi pinjam wang haram. Mahkamah mendapati bahawa ini adalah kes pinjaman mesra antara responden dan A1. Oleh itu, ss 5(1) dan 15 APPW tidak terpakai dan tidak membatalkan perjanjian pinjaman mesra antara pihak-pihak (lihat perenggan 47–48).

(2) Dalam kes pinjaman mesra, seperti di dalam kes ini, tiada faedah yang

seharusnya dikenakan dan sememangnya responden sebagai pemberi pinjaman telah mengambil hak milik dua hartanah tersebut dan perayu kedua juga memberi jaminan peribadi kepadanya. Oleh itu, berkenaan rayuan perayu, perintah Mahkamah Tinggi digantikan dengan perintah bahawa penghakiman dimasukkan terhadap perayu hanya untuk jumlah pokok RM800,000 berserta faedah pada kadar 4% setahun dari tarikh penghakiman Mahkamah Tinggi sehingga penyelesaian ('realisation') (lihat perenggan 49).

(3) Rayuan responden ditolak dan responden diperintahkan untuk mengembalikan hak milik tanah kepada pemilik berdaftar mereka iaitu Junaidah dan Mumtaz dalam tempoh 14 hari. Tiada perintah untuk membatalkan kaveat ke atas tanah kerana ianya adalah perkara yang tidak diplidkan atau dituntut (lihat perenggan 50).]

Cases referred to

Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 MLJ 333; [2020] 6 CLJ 1, CA (refd)
Mahmood bin Ooyub v Lee Chee Long [2020] 6 MLJ 755, CA (refd)
Muhibbah Teguh Sdn Bhd v Yaacob bin Mat Yim (t/a Tetuan Yacob Mat Yim & rakan-rakan) [2005] 7 MLJ 270; [2005] 4 CLJ 853, HC (refd)
Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9; [1979] 1 LNS 60, FC (refd)

Legislation referred to

Contracts Act 1950 s 71
Moneylenders Act 1951 ss 5(1), 10OA, 15
Rules of Court 2012 O 18 r 12(1)(a)

Appeal from: Civil Suit No AA-22NCVC-34–03 of 2018 (High Court)

Hong Chong Hang (with Koay Jing Qian) (Hong Chew King & Co) in Civil Appeal No A-02(NCvC)(W)-765–07 of 2020 for the appellants.
Ahmad Hazrin bin Abdul Rahman (Hazrin & Muzamil) in Civil Appeal No A-02(NCvC)(W)-855–07 of 2020 for the appellant.
Hong Chong Hang (with Koay Jing Qian) (Hong Chew King & Co) in Civil Appeal No A-02(NCvC)(W)-855–07 of 2020 for the respondent.
Ahmad Hazrin bin Abdul Rahman (Hazrin & Muzamil) in Civil Appeal No A-02(NCvC)(W)-765–07 of 2020 for the respondent.

Supang Lian JCA:

INTRODUCTION

[1] In the High Court, Applied Business Technologies Sdn Bhd (plaintiff at the High Court and respondent in Appeal 765) commenced an action against Triple Zest Trading & Suppliers Sdn Bhd, Junaidah bt Leman, Muhamad Fairuz bin Roslan and Mumtaz Syafinaz bt Roslan (the first, second, third and fourth defendants respectively at the High Court and appellants in Appeal 765) for breach of a friendly loan agreement and a 'Personal Guarantee by Director'.

[2] On 19 June 2020, after a full trial, the High Court had allowed the plaintiffs claim in part in terms as follows:

(a) first, second and third defendants pay the sum of RM1.6m to the plaintiff;

(b) interest at the rate of 4%pa on the judgment sum from the date of judgment until the date of full settlement; and

(c) cost of RM8,000 to be paid by the first, second and third defendants to the plaintiff and no costs to the fourth defendant.

[3] The plaintiff (appellant in Appeal 855) and the first, second and third defendants (the appellants in Appeal 765) have appealed against the decision of the High Court.

[4] The appeal by the defendants is against the decision of the High Court in allowing the plaintiff's claim for the sum of RM1.6m, cost of RM8,000 and interest at the rate of 8%pa from the date of judgment until full settlement being the sum due and owing to the plaintiff under a loan agreement.

[5] On the other hand, the plaintiff has appealed against the High Court's decision in disallowing the transfer to the plaintiff, lands described as Lot PT 9952 and Lot 9951, Pasir Panjang, Mukim Sitiawan, Daerah Manjung, Perak ('the lands') which, were used as collateral for the loan.

[6] We heard both the appeals together on 27 July 2021 and in a unanimous decision, allowed the defendants' appeal in Appeal 765 in part whereby the High Court order was set aside and substituted with an order that judgment be entered against the first and third defendants for the principal sum of RM800,000 together with interest at 4%pa from date of judgment in the High Court to date of realisation.

[7] With regard to the plaintiffs appeal, it was unanimously dismissed with a consequential order that the plaintiff do return the titles of the lands to the second and fourth defendants within 14 days from the date of our judgment and further made no order in respect of the removal of caveat as it was a matter not pleaded and claimed by the defendants.

[8] For convenience, the parties will be referred to as they were in the High Court.

BACKGROUND

[9] At the trial, the plaintiff was represented by its Chief Executive Officer ('CEO'), Faizalrizal Akbar bin Mohd Zawawee ('SP1') who was the plaintiff's sole witness.

[10] SD1 (second defendant) and SD2 (third defendant) and one Shamsuri bin Mohd Johar (SD3) gave evidence for the defence.

[11] The second defendant (SD1) is the third and fourth defendants' mother and the first defendant is a family owned company of the defendants.

[12] The plaintiff was a company involved in, amongst others, information technology. The first defendant was a company providing commercial services, supplier of certain petroleum products and was also involved in construction. second and third defendants (SD1 and SD2) are directors in the first defendant.

[13] It is the case for the plaintiff that it had agreed to grant a loan to the first defendant amounting to RM800,000. SP1 stated that SD1 and SD3 had agreed as to the 'agreed profits' to be given to SP1 for providing the loan. SP1 looked upon the agreement as a profitable investment for the plaintiff.

[14] According to SP1, both SD1 and SD3 had asked for a loan from the plaintiff as they desperately needed money for their business. SD1 was introduced to SP1 by SD3. SP1 regarded SD3 as the 'contact person' and also representative of the first defendant. SP1 had agreed to provide a friendly loan which, SP1 stressed, carried no element of interest. He asserted that the loan was to the first defendant and not to SD3

[15] The plaintiff and first defendant entered into the loan agreement dated 23 September 2016 (the loan agreement) which was marked as P1. SP1 testified that he had explained to SD1 and SD2 the contents of the agreement before it was signed. The relevant parts of the agreement were worded as follows:

Loan Amount to the Borrower and Agreed Profit to the Lender.

In consideration of the sum of Ringgit Malaysia Eight Hundred Thousand (RM800,000) only ('the Agreed Profit') which shall be payable by the Borrower to the Lender as the Agreed Profit to the Lender from this transaction, the Lender hereby agrees to lend and the Borrower hereby agrees to Borrow the sum of Ringgit Malaysia Eight Hundred Thousand (RM800,000) only ('the Loan Amount') to the Borrower on the terms set out hereunder.

Repayment of Loan and Security for Repayment

4.1 The Borrower shall repay to the Lender the Loan Amount together with the agreed profit to the total of Ringgit Malaysia One Million Six Hundred (RM1,600,00) only ('the Repayment Amount') immediately upon cessation of the Loan Period or at any time prior to the cessation of the Loan Period;

4.2 The Borrower shall required to deposit the following security to the Lender at the point of signing of this agreement:

a. third party collateral in a form of a parcels of land described as:

i. Lot PT 9952, Luas Lot 4694.3 Meter Persegi, Pasir Panjang, Mukim Sitiawan, Daerah Manjung, Negeri Perak;

ii. Lot PT 9951, Luas Lot 2018 Meter Persegi Pasir Panjang, Mukim Sitiawan, Daerah Manjung, Negeri Perak, and

b. Four (4) undated cheques issued from the Borrower's Current Account at the amount of Ringgit Malaysia Four Hundred Thousand (RM400, 000) only each, with a total value of Ringgit Malaysia One Million Six Hundred Thousand (RM1,600,000) only.

[16] Pursuant to the loan agreement, the second and third defendants also provided a 'Personal Guarantee by Director' (the directors' guarantee) marked as P3. This was to ensure that second and third defendants were personally liable for the loan if the first defendant defaulted in payment.

[17] It is an undisputed fact that the sum of RM800,000 was deposited on 23 September 2016 directly into the first defendant's account from plaintiffs account.

[18] Four undated cheques belonging to the first defendant each for the amount of RM400,000 were handed over to SP1 (CEO of the plaintiff) pursuant to the agreement. These cheques were marked as P5.

[19] The titles to the lands marked as P4 were also handed over to SP1. The second defendant and fourth defendants are the registered proprietors of the lands. SP1 contended that defendants had agreed to transfer the lands to the plaintiff as collateral for the loan. The plaintiff later caveated the lands.

[20] The plaintiff claimed that the first defendant had defaulted repayment of the loan agreement. The repayment sum totalled RM1.6m comprising of RM800,000 as the amount loaned and another RM800,000 as 'agreed profit'.

[21] Through its statement of claim, the plaintiff sought the following reliefs against the first,second, third and fourth defendants:

(a) the lands be transferred to the plaintiff;

(b) alternatively, the first, second and third defendants pay the plaintiff the sum of RM1.6m;

(c) in the event (b) is allowed, the lands are to be auctioned off to satisfy the amount owed by the first, second and third defendants; and

(d) interest at the rate of 4%pa on the judgment sum from date of judgment till date of realization.

[22] In their defence, the defendants pleaded, inter alia, that:

(a) the loan provided by the plaintiff was actually for one Shamsuri bin Md Johar and not to the defendants;

(b) the plaintiff never consented to the 'agreed profits';

(c) the loan was not a friendly loan but was in fact an illegal money transaction disguised as a friendly loan;

(d) the plaintiff had exerted undue influence on the second and third defendants into signing the personal guarantee documents;

(e) the fourth defendant ie the registered co-proprietor of the lands had never agreed and at no time executed any agreement with the plaintiff nor pledged the lands as security for the loan granted by the plaintiff; and

(f) it was never the intention of the defendants for the lands to be transferred in the event of default.

AT THE HIGH COURT

[23] In the High Court, the issues for determination are these:

(a) whether the loan was given to the first defendant or to SD3 (Shamsuri bin Mohd Johar) as alleged by the defendants;

(b) whether the loan granted was a 'friendly loan' or an illegal money lending transaction in contravention of the Moneylenders Act 1951;

(c) whether there was undue influence by SP1 (CEO of the plaintiff) on second and third defendants in obtaining their signatures on the loan agreement and/or the directors' personal guarantee; and

A (d) whether the plaintiff company was entitled to have the lands transferred to it in the event of default of the loan agreement.

[24] In his analysis, the learned High Court judge made the following findings of facts:

B (a) all the relevant documents starting from the loan agreement (P1) and the directors' guarantee (P3) had all referred to the first defendant as the borrower. These documents were contemporaneous documents where the authenticity of SD1 and SD2's signatures on the loan agreement and C directors' personal guarantee were never disputed. SD1, SD2 and SD3 admitted that it was their signatures on these documents;

(b) the cheques belonged to the first defendant's account. It was in evidence SD2 was the registered owner of one half of the lands. She was at all material time a director of the first defendant. Her daughter, the fourth D defendant owned the other half share of the lands. These documentary evidence lends weight to SP1's perception that SD3 was representing the first defendant;

(c) the money borrowed (RM800,000) by the defendants was deposited E directly into the account of the first defendant and from there distributed to Lockman Global Pte Ltd, SD3's son and the balance utilised by SD1;

(d) the invoice (marked D11) issued by Lockman Global Pte Ltd had billed both the first defendant and SD3;

F (e) it was SD1 and SD3 that had gone to meet SP1 for a loan and not the other way round. SP1, SD1 and SD3 had described themselves generally as business persons. SD1 and SD3 wanted desperately to borrow money for purposes of business on the terms and conditions as spelt out in the loan agreement;

G (f) as the evidence showed, there was only one loan transaction conducted in this case, which is the subject matter in this case. In other words, there is no element of continuity or system or repetition of similar transactions as the word 'business' would suggest;

H (g) SD1 and SD3 had agreed on the 'agreed profits' to be given to SP1 for providing the loan. SP1 saw this profitable investment and therefore agreed to grant the loan;

(h) SP1 had agreed to provide a friendly loan and SP1 had stressed that there I was no element of interest to the loan. The loan was to the first defendant and not to SD3;

(i) SD1 said that she was not forced into signing the document, however, she had earlier on stated that she did not do so willingly. There was no explanation forthcoming from SD1 as to this contradictory stance;

(j) it was never pleaded that SD3 had conspired with SP1 against SD1 and the fourth defendant in respect of the lands. SD3 was never questioned on the purported conspiracy;

(k) SD3 testified that SD1 knew that the land titles were to be used as collateral for the loan. It would therefore be naive on the part of SD2 to say that she did not know the purpose these documents were to be used for;

(l) SD1, SD2 and SD3's evidence was that the loan agreement and the directors' guarantee were signed by SD1 and SD2 for the sake of convenience and expediency and not induced by undue influence. SP1 on the other hand saw this as an opportunity to make a lucrative profit in the form of the 'agreed profit';

(m) there was no evidence that the plaintiff had ever held itself out as carrying on or advertising or announcing itself as carrying on 'the business of moneylending';

(n) SD1 and SD2 stated that the documents were in English, which they did not understand. In addition, they did not have the opportunity to peruse the documents or inquire about the contents as they were ordered not to ask questions by SD3. In these circumstances, SD1 and SD2 said they did not agree to the terms of the loan. SD1 and SD2 cannot by these reasons alone avoid being bound by the terms of the loan agreement and disregard their responsibilities therein; and

(o) it was never challenged and is an accepted fact that the fourth defendant owned one half of the lands. The other half belonged to the fourth defendant's mother (SD1). It is also an agreed fact that the fourth defendant is not connected or associated with the first defendant company in any way. It is obvious the fourth defendant was not a party to the loan agreement or directors' guarantee.

THE DECISION OF THE HIGH COURT

[25] In light of the documentary and oral evidence, and the findings of facts set out above, the learned High Court judge held as follows:

(a) the loan was to the first defendant and not to SD3;

(b) the plaintiff does not fall within the definition of 'moneylender' under the Moneylenders Act 1951. It would be wrong to look at individual aspects of the transaction, for example, the 'agreed profit', the late payment interest, the cheques and the land titles as indicating that the loan agreement was a money lending agreement. Looking at the transaction as a whole, including the directors' personal guarantee and that this was a 'one off affair, the said related collateral and securities were

in furtherance of accommodating the first defendant's need to raise funds in the dire financial situation it was in. It is common among the business community to lend money at the most advantageous of terms to the borrower, to those who desperately needed money in order to alleviate the borrower's financial problems. Although SP1 was a businessman, he was not, however, in 'the business of moneylending' merely by entering into a single loan agreement with the first defendant;

(c) in respect of undue influence purportedly exerted by SP1 on SD1 and SD2, this issue was raised at para 12 of the defendants' statement of defence where it was alleged that there was undue influence exerted on SD1 and SD2 by SP1 to sign the directors' personal guarantee. The defendants had failed to show that SP1 was in a position of dominance so as to exercise undue influence over SD1 and SD2. Merely because the plaintiff had a greater bargaining power over SD1 and SD2 did not mean that SD1 and SD2 had been induced by undue influence to sign the documents. Moreover, the particulars of undue influence were not pleaded as required under O 18 r 12(1)(a) of the Rules of Court 2012. Accordingly, by merely stating that there was undue influence at para 12 of the statement of defence without giving particulars thereof is fatal. This itself would dispose of the defendants' defence; and

(d) the plaintiff did not have any cause of action against the fourth defendant. If the court were to allow the plaintiff's prayer to transfer the lands to the plaintiff, it would adversely affect the fourth defendants' rights. That being the case, the learned High Court judge did not make an order for the transfer of the lands to the plaintiff.

[26] Based on the foregoing, the High Court judge allowed the plaintiffs claim as prayed for in para 23(b) and (d) of the statement of claim and awarded the plaintiff cost of RM8,000.

THE APPEALS

[27] The points raised by the defendants in this appeal are:

(a) the learned High Court judge erred in law and in fact in allowing the plaintiff's claim in the sum of RM800,000 together with a 100% interest totaling RM1.6m;

(b) the learned High Court judge has erred in law and in fact in finding the loan agreement dated 23 September 2016 and personal guarantee by director as a valid agreement in law; and

(c) the learned High Court judge has erred in law and in fact in finding the loan agreement dated 23 September 2016 and personal guarantee by director as 'Commercial Agreement' which does not contravene the Moneylenders Act 1951.

[28] The plaintiff on the other hand, raised the following points:

(a) the learned High Court judge has erred in law and in fact in allowing only para (b) of the statement of claim that the first, second and third defendants do pay the plaintiff a sum of RM1.6m together with interest and cost;

(b) the learned High Court judge has erred in law and in fact in discounting appropriate considerations but instead has taken into account considerations that are not relevant;

(c) the learned High Court judge has erred in law and in fact in not considering the terms agreed by the defendants in the loan agreement and the personal guarantee by director if they fail to settle the amount due within the agreed time frame;

(d) the learned High Court judge has erred in law and in fact in not accepting the very clear fact that the defendants were incapacitated and had failed to repay the loan to the plaintiff within the period agreed and the plaintiff is entitled for the lands to be auctioned off to satisfy the amount owed by the defendants;

(e) the learned High Court judge has erred in law and in fact in not considering the fact that the defendants had failed to give vacant possession of the lands to the plaintiff when they defaulted the repayment of the loan; and

(f) the learned High Court judge has erred in law and in fact in not considering the fact that the defendants had benefited from the loan given and the plaintiff was denied its right to auction off the lands to recover the amount owed when the defendants failed to make repayment within the agreed time frame.

THE PLAINTIFFS SUBMISSION

[29] The plaintiff's submissions, in brief, are:

(a) the defendants failed to prove that the plaintiff has charged 100% interest on the loan amount granted to the defendants;

(b) it is clear that the agreed repayment amount as stipulated in the loan agreement amounting to RM1.6m comprises the payment of the loan amount of RM800,000 together with the 'agreed profit' of RM800,000 which was agreed by both parties;

(c) the defendants were fully aware of the terms and conditions of the loan agreement and personal guarantee of directors and are therefore bound by the agreements;

(d) at all material times, the defendants never raised any discontentment on the 'agreed profit' before or after the signing of the loan agreement. It was only raised after the defendants filed their defence on 10 May 2018;

(e) the defendants agreed to pay the plaintiff the 'agreed profit' of RM800,000 for the loan and this was incorporated into the loan agreement by agreement of both parties. There was no interest imposed in the loan agreement. The plaintiff submitted that the plaintiffs company did not carry out money lending business/activity;

(f) the second and third defendants during the trial admitted that the signatures in the loan agreement and the guarantee agreement were signed by them willingly without any element of coercion from either side;

(g) at all material times, the plaintiff and defendants knowingly, willingly and in good faith agreed to be bound by the terms contained in the loan agreement without any element of coercion from any party; and

(h) alternatively, even if the court finds that no valid agreement existed between the plaintiff and the defendants, the defendants are still liable to repay the plaintiff for the benefits obtained by the defendants from the plaintiff pursuant to s 71 of the Contracts Act 1950.

THE DEFENDANT'S SUBMISSIONS

[30] No party in this case is alleging that the loan agreement is a commercial agreement. Thus, whether the loan agreement is a commercial agreement or not was never an issue in this case. The issue is whether the loan agreement is a friendly loan agreement or a sham agreement. The High Court erred in law and in fact in holding that the loan agreement is a commercial agreement. Based on this finding alone, the decision of the High Court is not safe and may create a dangerous precedent.

[31] It is stated in the loan agreement that the loan amount is RM8,000. However, the repayment amount is stated to be RM1.6m. Based on the repayment amount which is 100% more than the loan amount, it is clear that the plaintiff was lending the money with excessively high rate of interest and is not doing it as pure and simple to help out a business or friend in need out of goodwill or charitable heart.

[32] Even if the plaintiff is lending the money in sincerity to help out the defendants or SD3, the plaintiff should only charge reasonable rate of interest

that is comparable to the prevailing bank interest rates on loans for its genuine loss of use of money. Such gross excessive rate of interest suggests that the loan agreement is not a simple friendly loan agreement.

[33] It does not make sense if the courts allow parties with malicious intentions to misuse the term 'agreed profit' even though there is no profit at all in order to overcome the statute and Parliament's intention to regulate the rate of interest for loans under the Moneylenders Act.

[34] In light of s 10OA of the Moneylenders Act 1951, the burden has shifted to the lender to show that it is not in the business of moneylending. Throughout the trial, the plaintiff (respondent) has not adduced any proof that it is not in the business of moneylending. Therefore, the defendant submitted that the presumption of being a moneylender has not been rebutted.

[35] The High Court erred in fact and in law in holding that the loan agreement is a 'one off' affair since the respondent has failed to rebut the presumption under s 10OA of the Act.

[36] The loan agreement is a sham agreement which constituted moneylending within the meaning of the Moneylenders Act. As the plaintiff is not a licensed moneylender, the loans to the defendants constituted illegal moneylending. It follows that the personal guarantee by directors should also be rendered invalid because it stemmed from the loan agreement.

[37] Finally, the defendants submitted that the High Court is correct in disallowing the plaintiffs claim to transfer the lands which are held as security for the loan. This is because the loan agreement is void ab initio for illegality which means no restitution could happen.

OUR DECISION

[38] As regards the issue of whether the loan granted was a 'friendly loan' or an illegal money lending transaction in contravention of the Moneylenders Act 1951, it is necessary to set out the relevant provisions of the Act as follows:

MONEYLENDERS ACT 1951 (REVISED 1989)

ACT 400

2 Interpretation

In this Act, unless the context otherwise requires —

...

'borrower' means a person to whom money is lent by a moneylender;

A ...

'interest' does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, *includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan;* (Emphasis added.)

B ...

'moneylender' *means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business;*

C 'moneylending' means the lending of money at interest, with or without security, by a moneylender to a borrower;

...

D *5 Licence to be taken out by moneylender*

(1) No person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under this Act.

E ...

15 Contract by unlicensed moneylender unenforceable

No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

F ...

10OA Presumption as to the business of moneylending

Where in any proceedings against any person, it is alleged that such person is a moneylender, *the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.* (Emphasis added.)

G

[39] In *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9; [1979] 1 LNS 60 the Federal Court stated as follows:

H

At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondents and the client are moneylending transactions, the respondents must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a

I

transaction who thereby becomes the creditor may or may not be a moneylender. *He is a moneylender if within the meaning of s 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'. To prove business requires some sort of continuity or system or repetition of similar transactions* (*Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] MLJ 74; [1960] 1 LNS 17; [1962] AC 209 at p 218). (Emphasis added.)

[40] Quite naturally, and this is common knowledge, illegal moneylenders do not openly admit or declare themselves to be carrying on the business of moneylending. As a matter of fact, it is an uphill task for the borrower to produce evidence of loan transactions by the moneylender with other borrowers to show 'continuity or system or repetition of similar transactions'. In the face of such difficulty, a borrower will generally rely on the presumption as to the business of moneylending under s 10OA of the Act to prove the defence of unlicensed moneylenders for recovery of loans and interest.

[41] In this regard, the Court of Appeal observed as follows in *Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd* [2020] 6 MLJ 333; [2020] 6 CLJ 1:

[135] The definition of 'moneylender' is as follows:

'moneylender' means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business;

[136] There was also another amendment effected to the Moneylenders Act 1951 which came into force on 15 April 2011. It introduced s 10OA which according to the explanatory statement to the bill, it seeks to facilitate the proof of business of moneylending. Section 10OA makes even more difficult for lender who had charged interest on the loan given to say it was a one-off transaction by allowing a legal presumption to be drawn against the lender ...

[137] A brief evolution of the amendments brought to the Moneylenders Act 1951 by the 2003 Amendment and the 2011 Amendment can be found in the case of *Menta Construction Sdn Bhd v SPM Property & Management Sdn Bhd & Anor* [2017] MLJU 526; [2017] 1 LNS 675 as follows:

[98] There were major amendments introduced on 1 November 2003, with respect to the Moneylenders Act 1951. The changes brought about by the Moneylenders (Amendment) Act 2003 (MAA 2003) Act A1193 — PU(B) 332/2003. The watershed amendment was in the definition of 'moneylender' which was amended to read:

'moneylender' means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him.

[99] Under such a definition, *it would appear that even a single transaction would be caught if the agreed amount to be repaid would be more than the amount lent if one is not a licensed moneylender.* Parliament must have realised that the net might

have been cast too broadly such that even genuine friends who want to help might be caught even if they were to merely charge the borrower the costs of their funds.

[100] There was a further amendment effected in 2011 (vide Moneylenders (Amendment) Act 2011) of which the definition of 'moneylender' under the old regime (Moneylenders Act 1951) has been re-introduced and re-adopted again. In *Leong Chooi Peng v Tee Yam* [2011] 1 LNS 1709, I had made this comment at the postscript as follows:

> Perhaps Parliament has cast its net too wide in that in trying to stamp out the bad loan sharks it had also stymied the benign friends who can only be beneficial when in one's hour of need, help comes in a friendly loan where a borrower would not mind covering the cost of fund of the lender. Call it interest, call it a consideration of a larger sum being repaid — it is a harsh reality in a real world where the love of money in as much as the lack of money is a root of all kinds of evil. There seems to be a change of heart in the Moneylenders (Amendment) Act 2011 (Act A1390) which came into force on 15 April 2011 vide PU(B) 174/2011. *'Moneylender' has now been redefined to mean any person who carries on or advertises or announces himself or holds himself out in any way* as *carrying on the business of moneylending, whether or not he carries on any other business.* A new s 10OA now reads:
>
> > Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.
>
> Being a rebuttable presumption, those cases that deal with the meaning of 'the business of moneylending' as referred to in *Muhibbah Teguh*'s case might well prove relevant again in the future in resolving a once-off friendly loan transaction with interest.

[138] Therefore, even though this appears to be a once-off or one-off transaction, *the burden has now shifted to the lender to show that it is not in the business of moneylending. The* guidance provided in the case of *Muhibbah Teguh Sdn Bhd v Yaacob bin Mat Yim (t/a Tetuan Yacob Mat Yim & rakan-rakan)* [2005] 7 MLJ 270; [2005] 4 CLJ 853 would be helpful where Vincent Ng J (as he then was) held, at p 275 (MLJ); p 857 (CLJ):

> It is axiomatic that one or two moneylending transactions (even in consideration of a larger sum) does not make the lender a moneylender within the purview of the definition of 'moneylender' in s 2 of the Act. *It is also axiomatic that the Act is intended to apply to moneylenders exclusively and not to moneylending transaction or transactions per se.* This statement of law was again affirmed by Federal Court in *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14; [1960] 1 LNS 169 which I shall discuss later in this judgment. (See also *Cheong Kim Hock* [1992] 2 SLR 349, *Lek Peng Lung* [1992] 2 SLR 150 and *Subramaniam Dhanapakiam* [1991] 2 MLJ 447; [1991] 1 LNS 101).

[139] We had held that the interest element is in the RM400,000 reflected on the

first SPA which we had held was never cancelled, *the question is whether a single transaction shown can make the plaintiff a moneylender. It is not in dispute that the plaintiff does not have a moneylending license. In the light of the presumption in s 10OA of the Moneylenders Act 1951, a presumption is drawn that it is a moneylending transaction.*

[140] The plaintiff had not adduced any evidence to rebut the presumption and the stand taken by the plaintiff was that it was a sale and purchase of property transaction. Having made that election, the plaintiff cannot resile from it and indeed did not lead evidence to rebut the presumption. (Emphasis added.)

[42] In the same vein, the Court of Appeal in *Mahmood bin Ooyub v Lee Chee Long* [2020] 6 MLJ 755 held that a one-off loan transaction with interest would raise the presumption under s 10OA of the Moneylenders Act 1951.

[43] Based on what the Court of Appeal had iterated in *Global Globe Property* and *Mahmood bin Ooyub*, the burden had shifted to the plaintiff in the present case to show that it was not in the business of moneylending. The defendants argued that throughout the trial, the plaintiff had not shown any proof that it was not in the business of moneylending. Therefore, the defendants submitted, the presumption of carrying on the business of moneylending had not been rebutted by the plaintiff.

[44] On this issue, we agree with the High Court judge that as a matter of fact, the presumption of moneylending has been rebutted by the plaintiff. This is a case where the first defendant, the borrower, had sought out the plaintiff when it was in dire financial straits. The trial judge found that not a shred of evidence was adduced by the defendants in this case to show that the plaintiff had held itself out as carrying on or advertising or announcing themselves as carrying on 'the business of moneylending'. He also found that based on the testimony of witnesses, there was only a single loan transaction, which is the subject matter in this case. This led the trial judge to the conclusion that there was no element of continuity or system or repetition of similar transactions to prove the 'business' of moneylending.

[45] Moreover, the existence of the loan transaction in the present case is beyond question. The loan agreement (P1) and the testimony of all parties bear this out. In fact, SD1 in her testimony admitted that the loan agreement was between the plaintiff and the first defendant. Furthermore, SD1 had executed the loan agreement.

[46] The above are findings of fact based on the evidence adduced and evaluated by the trial judge. We are loathed to interfere with such findings and indeed have no reason to do so. However, the question to be determined is whether the plaintiff had carried out the business of moneylending under the

Moneylenders Act 1951 bearing in mind that the Act is *intended to apply to moneylenders exclusively and not to moneylending transaction or transactions perse,* (see *Ngui Mui Khin* and *Muhibbah Teguh Sdn Bhd v Yaacob bin Mat Yim (t/a Tetuan Yacob Mat Yim & rakan-rakan)* [2005] 7 MLJ 270; [2005] 4 CLJ 853).

[47] At the trial, SP1, testified that he is not a moneylender and that the plaintiff was a company involved in information technology. He stated as follows under cross-examination:

Cross Examination (SP1)

PD: Apakah jenis perniagaan Syarikat Plaintiff?

SP1: Syarikat saya?

PD: Ya

SP1: Kami syarikat yang menyediakan perkhidmatan ICT, teknologi maklumat. Membekalkan dan menyediakan perkhidmatan teknologi maklumat

Hakim: Kepada pelanggan?

SP1: Kepada pelanggan

PD: Sila rujuk Bundle A muka surat 1. Ini adalah SSM syarikat encikkah?

SP1: Ya

PD: Di bawah sekali, nature of business, information technology?

SP1: Betul

PD: Sahkan ya, syarikat awak cuma information technology Mark as ID first

PD: May I proceed. Untuk meminjamkan wang RM800 ribu ini, perlukah Syarikat Encik menyediakan company resolution?

SP1: Tidak perlu

PD: Betul

SP1: Ya

[48] We are of the view that even if the rebuttable presumption has arisen under s 10OA of the Act that the plaintiff is presumed to have carried on moneylending business, we find as a fact that plaintiff had adduced sufficient evidence to rebut this presumption on a balance of probabilities. The evidence of SP1 that the plaintiff was in the business of information technology is undisputed by the defendants. The loan agreement was with the plaintiff who carried on an information technology business. There is no evidence or sufficient proof before the trial court that the plaintiff was engaged in a moneylending business. There was also no evidence that the plaintiff had loaned money to borrowers in the past. In the absence of such evidence, we are

of the view that the plaintiff had successfully rebutted the presumption under s 10OA.

[49] We are thus satisfied that the plaintiff did not carry on a moneylending business. On that basis, we agree with the trial judge that the defendants had failed to prove on balance of probabilities that the plaintiff was in fact an illegal moneylender. Instead we are of the same mind as the trial judge that this is a case of a friendly loan agreement between the plaintiff and the first defendant. Therefore ss 5(1) and 15 of the Moneylenders Act 1951 have no application here and do not invalidate the friendly loan agreement between the parties.

[50] We took the view that in a case of a friendly loan like in the present case, no interest ought to be chargeable and indeed the lender ie the plaintiff had already taken custody of the two land titles as well as having the personal guarantee of the second and third defendants. Thus, in respect of Appeal 765, we allowed the appeal of the borrower (first defendant) in part in that judgment was entered against the first to third defendants for the principal sum of RM800,000 together with interest at 4%pa from the date of judgment in the High Court to realisation. The High Court order in Appeal 765 was thereby set aside and substituted with the order of this court.

[51] As for the plaintiffs appeal in Appeal 855, we dismissed the appeal and made a consequential order for the return of the titles to the registered owners, namely, second defendant and fourth defendant within 14 days of the date of the court order. Counsel for the appellant sought an order for the removal of the caveat but we did not accede to the request as it is a matter that was not pleaded or claimed for.

[52] Finally, we ordered that each party was to bear its or his/her own costs of these appeals.

Order accordingly.

Reported by Ashok Kumar